No. 3910

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROSSETT WESTERN LUMBER COMPANY (a corporation),

Appellant,

vs.

SUDDEN & CHRISTENSON, claimants of the cargo of the American Steamship "TAMPICO",

Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLICK,
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Of Counsel.

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Statement of the Case.

This case comes again before this Court upon a second appeal and pursuant to a last, and what we feel must necessarily be a fruitless attempt on the part of the appellant to avoid and defeat the decree and judgment of this Court in favor of the appellee (*The "Tampico"*, 270 Fed. 537). We are not able to entirely agree with appellant's statement of the case appearing on pages 1 to 9 inclusive of its brief, for the reason that appellant has

therein attempted, by implication, to again argue matters that have been finally determined in the case by this Court on the prior appeal. There is one, and only one question that this Court has not finally and conclusively determined. All of the other issues of this case, including those attempted to be raised in appellant's brief are *res adjudicata.* The facts and issues of the case are stated in the opinion of this Court, so much more clearly and concisely than we could hope to state them, that we have taken the liberty of including the opinion in this brief. We have italicized certain portions of the opinion and have added certain marginal notations, so that the attention of the Court may be called to those portions of the opinion to which we will herein refer. It must be borne in mind that, in the quoted opinion, the "appellant" is Sudden & Christenson (appellee herein) and the "appellee is Crossett Western Lumber Co. (appellant herein).

OPINION.

"On April 15, 1915, the Pacific Coast Steamship Company, the owner of the Steamship Tampico, chartered the vessel to the appellee. The charter party provided for redelivery of the vessel to the owner not later than July 1, 1916, unless the time of redelivery should be extended by the owner for a further period of 60 days. But it contained the further provision that the owner might, if it should so elect, require that the vessel be redelivered to it at Seattle, Washington, on or about May 15, 1916, upon its giving to the appellee on or before February 1, 1916, a written notice to that ef-

fect, and it provided that on such notice being given the vessel might be redelivered at any time between April 1, 1916 and May 15, 1916. On October 18, 1915 the appellee subchartered the steamship to the appellant. The subcharter party gave to the appellant the use of the steamship for a stipulated voyage, with the option to use the same for a second voyage upon the same terms and conditions as the first. It contained a marginal provision as follows: 'Subject to the conditions of redelivery as per charter between Crossett Western Lumber Company and Pacific Coast Company'. The appellant performed the first voyage and thereafter on December 31, 1915, it duly notified the appellee in writing that it intended to exercise its option for a second voyage. The notice was required to be in writing, and to be given 20 days at least before the second voyage was undertaken. On January 3, 1916, the appellee acknowledged receipt of the notice. On January 7, 1916, the Pacific Coast Steamship Company notified the appellee that it required a redelivery of the vessel by May 15, 1916. On January 11, 1916, the appellee telegraphed the appellant as follows: 'Our charter has clause Tampico must be delivered May fifteenth if notified by February first. Pacific Coast served notice today. We there notify you.' On the following day the appellant replied directing the attention of the appellee to its previous statement that the appellee's charter on the Tampico expired not later than June 15, and stating that the appellee expected 'to be able to redeliver at an Atlantic port on or about May 4th if canal be open, or if canal be closed, on Pacific Coast port on or about May 10th next.' * * * We do not understand your telegram under date of January 11th, and we would like you to advise us at

once on what ground the Pacific Coast S. S. Co. claims the right to notify you that the Tampico must be redelivered by May 15, 1916.' To that letter the appellee answered referring to the terms of its charter with the owner. The second voyage was begun on February 22, 1916. The vessel went to the coast of South America, and there loaded a cargo of nitrate and thence started northward, and arrived at the Pacific entrance to the canal about April 29, 1916. The canal was then open for navigation. The captain of the vessel had received instructions from the owner prior to the loading 'to proceed as charterer's agent directed, but to load for San Francisco'. Pursuant to these instructions he proceeded to San Francisco, where the vessel was redelivered to the appellee on May 19, 1916. The appellant withheld the charter hire of the vessel from April 23, 1916 to May 19, 1916, amounting to $8,492.88, contending that it had the right to complete the voyage through the canal to the Atlantic Coast and then make redelivery of the vessel prior to June 15, 1916, in accordance with the terms of the charter party. The appellee filed its libel to recover the unpaid charter hire. The appellant answered, setting up the defense that the appellee had failed to perform the conditions of the charter party, and that the appellant had been damaged thereby; and the appellant filed a cross libel setting up the facts with regard to the second voyage and claiming damages in the sum of $14,871.57. Answering the cross libel, the appellee pleaded the defense that the charter party between the appellee and the appellant was subject to the condition of redelivery contained in the charter party between the appellee and the owner. *Upon the*

pleadings and the evidence, the court below found that the condition for redelivery contained in the charter party from the owners to the appellee was binding upon the appellant, and judgment was entered for the appellee for the unpaid charter hire from April 23, 1916 to May 19, 1916, and the cross libel was dismissed.

Theory upon which case was decided in Court below on the first trial (reversed).

Gilbert, Circuit Judge, after stating the case: The conclusion of the court below was based upon the rule which was applied by this court in Conner v. Manchester Assur. Co., 130 Fed. 743, where he held that an insurance certificate containing the provision that its terms were subject to all the terms and conditions of a certain open policy in the possession of the insurance company, bound the insured to the provisions of such open policy, although he had no knowledge of the contents thereof. The facts in the present case, we think, take the controversy out of the rule there announced. The appellee held the Tampico under a charter from its owner. It entered into a charter party with the appellant for a prescribed voyage, giving it the option to use the vessel for a second voyage of a similar nature. The contract was expressly made subject to the provisions of the original charter from the owner to the appellee. The appellant sent the vessel on her first voyage. At that time it had not determined whether or not it would exercise the option for a second voyage. On December 17, 1915, the appellee wrote to the appellant inquiring whether it would want the vessel for another voyage. On December 20 the appellant answered saying, 'Will you please send us copy of your contracts with the Pacific Coast Company with reference to this steamer. We have a copy of the Eureka contract, but not of the charter of the Tampico. * * * As soon as we have

Negotiations for contract between Sudden & Christenson and W. R. Grace & Co.

this information we hope to be able to answer promptly as to whether or not we will want to use the vessel for another trip.' *At that time the appellant was negotiating with W. R. Grace and Company for the use of the Tampico for a second voyage.* The letter of December 20 was sent in order to ascertain the date of the appellee's redelivery obligation to the owner. On December 27, 1915, the appellee answered saying that its charter of the Tampico from the owner 'reads practically the same as that of the Eureka except that we are to make redelivery about June 15', and the letter closed with the request that on receipt thereof the appellant advise the appellee of its decision as to the option. *Upon receipt of that letter the appellant closed its negotiation with W. R. Grace & Company and fixed the vessel for the second voyage.* On December 31, 1915, the appellant wrote to the appellee: 'We will exercise our option of the second voyage of the steamer "Tampico"; On January 3, 1916 the appellee acknowledged receipt of that notice and said, 'As we formerly wrote you the charter of this boat expires not later than June 15, 1916.' These communications from the appellee answered the appellant's inquiry as to the term of the original charter party. The appellant had asked for a copy of that charter for the purpose of ascertaining the length of time for which the owner had parted with the right of possession. The letters conveyed that information fully and completely. The appellant had the right to reply on the information so furnished. It had the right to believe that there was no provision in that charter party by which the term thereof could be abbreviated at the option of the owner. *The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon,*

Contract between Sudden & Christenson and W. R. Grace & Co.

Sudden & Cristenson relied and acted upon the representations of Crossett-Western Lumber Co.

and the appellant in acting upon it exercised such reasonable diligence as the circumstances required. The situation is the same as it would have been had the appellee sent the appellant a copy of that charter party with the optional provision in favor of the owner inadvertently omitted therefrom. The appellee knew for what purpose the information was sought, *and it was advised of the voyage which the appellant had in contemplation.* For further information it referred the appellant to the charter which the appellee had from the owner of the Eureka, a copy of which was in the possession of the appellant. That charter party contained no provision by which the term thereof could be abbreviated at the option of the owner.

Crossett-Western Lumber Co. advised of second voyage of "Tampico".

The appellee asserts as to the case made by the cross libel that estoppel cannot be used as a basis of affirmative relief and cites Dickerson v. Colgrove, 100 U. S. 578, where the court said that estoppel 'is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit.' That was an action of ejectment. The defense was based upon equitable estoppel and was held sufficient, the court ruling that the action involved both the right of possession and the right of property, and as the facts indicated that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, the latter might rely upon the doctrine of equitable estoppel to protect their possession. *In the present case estoppel is not made the basis of the relief sought by the cross libel. The relief sought is based only upon the terms of the contract between the appellant and the appellee, and estoppel is asserted only as against the defense which the appellee pleaded thereto, and we see no reason why it is not available for that purpose.*

Breach of contract and not estoppel is basis of Sudden & Christenson's damage.

Crossett Western Lumber Co. is estopped to defend damages.

It is contended that there can be no estoppel in cases where, as here, the representations were made without fraudulent intent. But the rule is well established that it is not necessary that the representations shall have been made with such an intent. It is sufficient if they are 'of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on.' 21 C. J. 1121; 10 R. C. L. 691.

Contract between Sudden & Christenson and W. R. Grace & Co. has been admitted by Crossett Western Lumber Co.

One of the defenses asserted by the appellee to the damages claimed upon the cross libel is the fact that the appellant sub-let the Tampico to W. R. Grace & Company without the consent of the appellee, the charter between the appellant and the appellee having provided 'Charterers to have the option of subletting the steamer provided consent of owners obtained', and Mitchell the manager of the appellee having testified that the appellee never consented to any sub-charter. To this it is to be said that *it does not appear from anything in the record that the appellant did in fact sub-charter the vessel to W. R. Grace & Company, or that it entered into any agreement with that company other than a contract of affreightment.* It appears also that the letter of the appellant to the appellee of December 20, 1915, advised the appellee that the *appellant proposed to use the Tampico in performing its obligation to W. R. Grace & Company and that no objection was made by the appellee.*

Sudden & Christenson entered into only a contract of affreightment with W. R. Grace & Co.

Crossett-Western Lumber Co. was advised of the intended second voyage of the Tampico and did not object thereto.

The record presents the question of the rights and obligations between the appellant and the appellee *from and after the time when the former received on January 11, 1916 notice that the Pacific Coast Steamship Company demanded possession of the vessel on or before May 15,* under the rights which were reserved to it in the original charter. We think *that from and after that date* the appellant had no

right to enter into contracts for the use of the Tampico in reliance upon the appellee's said representations. The vessel was then on her way home from her first voyage. She was not sent out upon the second voyage until February 22, 1916. What the contractual relations were between the appellant and W. R. Grace & Company *on January 11* does not appear from the record. It is not shown that there was *then* a binding contract between them. The appellant's testimony that *at that time* the vessel was fixed for the second voyage may mean only a fixed intention in the minds of the appellants to use the vessel for a second voyage. The appellant's defense to the original libel and its claim for damages in the cross libel rest upon estoppel, and to establish estoppel it must show that relying upon the representations of the appellee, it changed its position to its injury. 'The whole office of an equitable estoppel is to protect one from a loss which but for the estoppel he could not escape.' 10 *R. C. L.* 698.

This Court's inquiry does not question the fact that Sudden & Christenson had entered into a contract with W. R. Grace & Co., but merely requires that it be shown that such contract existed prior to January 11, 1916, which it did.

We think the decree of the court below should be reversed, and the cause remanded to that court with instructions to ascertain and adjudge the amount, if any, to be awarded to the appellee upon the issues created by the libel and the answer thereto and the damages, if any, to be awarded to the appellant under the issues arising upon the cross libel, and to enter a decree accordingly. The parties to have permission to take further testimony upon the issues so to be determined. It is so ordered."

In view of the above quoted decision of this Court, it appears that the case was sent back to the District Court to ascertain and adjudge damages to be awarded to the parties upon the issues created by the libel and cross libel, and the answers thereto, *in view of any contractual relations that had been*

entered into by the appellee herein and W. R. Grace & Co. ON OR PRIOR TO JANUARY *11, 1916.* All questions of liability have been definitely and finally determined by this Court and are *res adjudicata.*

In deciding the question of liability this Court has held: *First:* That appellant has been guilty of a breach of contract in demanding the return of the *"Tampico"* prior to May 15, 1916, and the delivery of the vessel on the Pacific Coast rather than on the Atlantic Coast, and: *Second:* That appellant is estopped by its conduct from defending the damages claimed by appellee. The sole inquiry of this Court, and the only purpose for which it was remanded, was to ascertain whether or not the contractual relations between the appellee and W. R. Grace & Co. existed on or prior to January 11, 1916, *and then* to assess the damages. There was no question in the mind of the Court as to the damages, but only as to whether or not those damages accrued to appellee pursuant to a contractual obligation entered into *on or prior to January 11, 1916,* and that is the only purpose for which the case was remanded.

The term of the charter party between the appellant and the appellee was fixed only by the time to be consumed in the stipulated voyage and the optional second voyage. Appellant is guilty of a very strained and incorrect construction of the opinion of this Court when it says that this Court has held that:

> "Notwithstanding the terms of the charter party, the Crossett Western Lumber Company,

> by failing to mention the anticipation privilege, was estopped thereby from declaring a termination of the sub-charter prior to the 15th day of June, 1916, if, relying on this incorrect statement, Sudden & Christenson entered into a new contract'' (Appellant's Brief, p. 4).

for this Court has held in final judgment on this question that:

> ''The relief sought is based only upon the terms of the contract between the appellant and the appellee,''

and thus that the representations made by the appellant with reference to the redelivery date of the *''Tampico''* were part of the contract between the parties.

On page 4 of its brief, the appellant recites that on January 10, 1916 it notified the appellee that under no circumstances would it allow the *''Tampico''* to go to the Atlantic Coast, and that it *thereafter* adhered to that position, and that appellee, notwithstanding this notification, thereafter began the second voyage to load a cargo of nitrate for W. R. Grace & Co. from South America to the Atlantic Coast.

The charter party provides for a voyage and optional second voyage *to the Atlantic Coast, and for redelivery on the Atlantic Coast* (First Apostles, pages 10, 11). The appellant has admitted these facts in its peadings and briefs.

As noted by the Court in its opinion, the appellee notified the appellant on December 20, 1915, that it intended to use the *''Tampico''* for a second voyage in performance of its obligation to W. R. Grace

& Co., substituting the *"Tampico"* for the Steamer *"Eureka"* (First Apostles, pages 61-62). The appellant was fully advised as to appellee's obligations on the *"Eureka"* (this vessel being then on the *Atlantic Coast*) because it had likewise sub-chartered the *"Eureka"* to the appellee.

Mr. Mitchell, appellant's manager, testifies that certain telegrams were sent "before the consent of the Pacific Coast Steamship Company was received for the second voyage" (First Apostles, page 46). Evidently, even the owner of the vessel consented to the second voyage of the *"Tampico"*; and of course it could have done so only through the appellant.

On January 3, 1916, the appellant inquired of the appellee as to what trip the appellee proposed to make with the *"Tampico"* on her second voyage (First Apostles, page 157) and did not suggest any objection to a voyage to the Atlantic Coast. On January 5, 1916, the appellee advised the appellant that if the Canal were open, the *"Tampico"* would proceed to the Atlantic Coast on her second voyage (First Apostles, page 158).

Commencing, then, with December 20, 1915, the appellant was fully advised that the second voyage of the *"Tampico"* would be for W. R. Grace & Co. to the Atlantic Coast. No objection of any kind was made to this proposed voyage up to and including December 31, 1915, when the appellee exercised its option for the second voyage *to the Atlantic Coast*, nor thereafter *until January 10,*

1916, when the appellant, *for the first time,* notified the appellee that the *"Tampico"* would not be permitted to go to the Atlantic Coast. This was *after* redelivery on May 15, 1916 had been demanded by the Pacific Coast Steamship Company, and *after* the appellee, relying upon the representations theretofore made by the appellant, had entered into its contract with W. R. Grace & Co. for a voyage to the Atlantic Coast. It is apparent that the reason for appellant's notification that the vessel would not be permitted to go to the Atlantic Coast was because demand for redelivery of the vessel on the Pacific Coast by May 15, 1916 had aready been made by the Pacific Coast Steamship Co. *on January 7, 1916.* It is equally apparent that the reason that the appellee sent the *"Tampico"* on her second voyage was because it had become bound to do so under its contract of January 4, 1916, with W. R. Grace & Co.

Prior to the events above noted the appellee had contracted with W. R. Grace & Co. to carry a cargo of nitrate on the S. S. *"Eureka"* (which had likewise been sub-chartered by the appellant to the appellee) from the West Coast of South America through the Panama Canal to New York. On account of the closing of the Canal the *"Eureka"* was not available for that purpose and was excused from performance of the voyage. As early as October 4, 1915, the appellee inquired of the appellant whether or not the *"Tampico"* could be substituted for the *"Eureka"* (First Apostles, page

181). The charter party between the appellant and the appellee on the *"Tampico"* was executed under date of October 18, 1915, and *under the same date* the appellant and the appellee executed a mutual release and cancellation of their sub-charter on the *"Eureka"* (First Apostles, page 176). From thence onward the *"Eureka"* was no longer available to appellee.

It is plainly apparent that these transactions were carried through by both parties with the idea that the *"Tampico"* was to be substituted for the *"Eureka"*, and that idea, several times expressed between December 20, 1915 and January 10, 1916, obtained down to the time when the Pacific Coast Steamship Company notified the appellant that it would require redelivery of the vessel on the Pacific Coast by May 15, 1916. In the interim the appellee, relying upon the representations of the appellant, had contracted with W. R. Grace & Co. for the second voyage of the *"Tampico"*.

On January 4, 1916, the appellee, through its agents at New York, confirmed its agreement with W. R. Grace & Co. for the second voyage of the *"Tampico"* (see letter, Appellant's Brief, pages 5, 6). To this letter was attached, for reference, the agreement between appellee and W. R. Grace & Co. on the *"Eureka"*. January 4, 1916 fell on a Tuesday. On the preceding Friday, December 31, 1915, the appellee, relying on the representations of the appellant, had exercised its option for the second voyage. Appellee, having thus established

its right to the use of the steamer for the second voyage, forthwith entered into its contract with W. R. Grace & Co. to carry a cargo of nitrates from the West Coast of South America through the Canal to the East Coast of the United States. This is conclusive evidence that the New York agents of the appellee acted only pursuant to appellee's instructions in this particular given *after* appellee had exercised its option in reliance on the representations of appellant and was assured of its right to undertake the second voyage of the vessel. The appellee, in exercising its option for the second voyage, naturally undertook the continuance of the responsibilities stipulated in the charter party, and, in entering into its contract with W. R. Grace & Co., engaged, unless the Canal was closed at the time the *"Tampico"* was ready to leave her loading port, to carry a cargo of nitrates on the *"Tampico"* from the West Coast of South America through the Canal to the Atlantic Coast of the United States. It is the admitted and conceded fact that the Canal was open at the stipulated time (April 15, 1916) (Stipulation of Facts, First Apostles, page 195) and the appellee was bound by its contract to complete the voyage agreed upon. The contract between the appellee and W. R. Grace & Co. created a new obligation. The *"Eureka"* was not available for the voyage, the sub-charter between the appellant and the appellee on that vessel having been cancelled on October 18, 1915, the same day that the sub-charter on the *"Tampico"* was entered into

between the same parties. The appellant desired to make redelivery of the *"Eureka"* on May 15, 1916 (letter from appellant to appellee, dated December 27, 1915, First Apostles, pages 58, 59). The Canal was closed at the time the appellee entered into its contract with W. R. Grace & Co. for the *"Tampico"*. Through the closing of the Canal appellee was excused from the performance of its obligation to W. R. Grace & Co. on the *"Eureka"*. The contract for this vessel between appellee and W. R. Grace & Co. stipuated that the intended voyage should be "via Panama Canal". The *"Eureka"* was on the Atlantic Coast and could not even proceed to her loading port on the West Coast of South America. The usual exception clause, appearing in the contract, excused the vessel as the closing of the Canal made the proposed voyage impossible. In addition, W. R. Grace & Co. had the right to cancel the agreement if the vessel should "not be ready to load at loading port on or before 6 o'clock p. m. on the 15th of January" (see Christenson's Exhibit 1). This, on account of the closing of the Canal, was an impossibility.

We have heretofore referred to the fact that all questions of liability in this case have already been decided by this Court in favor of the appellee upon the grounds that appellee is entitled to relief under the terms of its contract with the appellant, which included the representations as to redelivery date made by the appellant. This Court *has not said,* as stated by appellant on page 7 of its brief, that *if*

Sudden & Christenson, relying upon the representations of appellant, proceeded to "sub-charter" the vessel to W. R. Grace & Co., that appellant was thereby estopped from thereafter claiming a return of the vessel at an earlier date. This Court has specifically held that appellee *did* rely on the representations of appellant, for it has said that:

> "The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon, and the appellant" (Sudden & Christenson) "*in acting upon it,* exercised such reasonable diligence as the circumstances required."

This Court *has not,* as stated on page 8 of appellant's brief, referred this cause back to the District Court to ascertain what was the contractual relationship between *Sudden & Christenson and Crossett Western Lumber Company.* This Court has definitely decided upon the contractual relationship between appellant and appellee, it has definitely found that there was a "contract of affreightment" between appellee *and W. R. Grace & Co.,* and remanded the case to the District Court for the sole purpose of finding whether the contractual relationship between appellee and W. R. Grace & Co. existed *on or prior to January 11, 1916,* and then, if such contractual relationship existed *on or prior to said time,* to assess the damages. This Court has merely said that it did not appear from the record before it on the first appeal what were the con-

tractual relations between appellee and W. R. Grace & Co. *on January 11, 1916;* that the said record did not show that there was *then* a binding contract between them and that appellee's testimony that *at that time* the vessel was fixed for a second voyage might have meant only a fixed intention in the minds of appellees to use the vessel for a second voyage. This Court has *never* found that the contractual relations of appellee and W. R. Grace & Co. have not been shown; it has *never* found that a binding contract between these parties for the second voyage of the *"Tampico"* did not exist, but it has only said that it did not appear if these facts were true *on January 11, 1916.* It was not *the fact of* the contract but *the time* at which the contract was made to which the inquiry of this Court was addressed. Pursuant to the remanding of the case, evidence has been adduced to show conclusively, and the District Court has found, that the appellee, relying on the representations and contractual undertakings of appellant, entered into its contract with W. R. Grace & Co. for the second voyage of the *"Tampico", on January 4, 1916* and that (as conceded by appellant) the Canal was open on the day the *"Tampico"* was ready to sail from its loading port. These findings are not disputed by appellant *and they are the only findings from which an appeal may be prosecuted.* All other issues of the case have already been decided by this Court. Pursuant to its said findings the District Court has decided that the appellant is entitled to its unpaid

charter hire and the appellee is entitled to its damages, leaving a net sum of $8799.96, with interest, due to the appellee.

With the record before it, and which is now before this Court, the District Court could not have done otherwise.

On pages 8 and 9 of its brief, appellant sets forth certain questions which it says are to be determined on this appeal within the rulings of this Court on the prior appeal. These questions, however, are *not* to be determined on this appeal, and are *not* within the rulings of this Court on the prior appeal.

First: This Court has held that the appellee entered into a new contract with W. R. Grace & Co. relying upon the representations of appellant; and the record supports such holding.

Second: This Court did *not* hold on the prior appeal that there was no evidence before it upon which it could award damages against appellant, and *did not* remand the case in order that such evidence might be supplied. This Court remanded the case for the sole purpose of ascertaining *the time* at which appellee entered into its contract with W. R. Grace & Co. and directed the Court to assess the damages if such time was prior to January 11, 1916. The evidence produced on the second trial has satisfied this sole prerequisite of this Court and pursuant thereto the District Court has found that such time was on January 4. 1916, (and this fact is not disputed) and has assessed the damages accordingly.

Third: The record shows, *and it has never been disputed by appellant, either in the first trial of this case before the District Court, in its brief submitted thereon, on the first appeal of this case, or its brief submitted thereon, or on the second trial of this case in the District Court, but that the damages claimed by appellee were advanced upon a proper basis and in a proper amount,* and the record shows that appellee is properly entitled to said damages.

Fourth: This Court has held and the record shows that appellee is claiming damages arising out of a breach of contract on the part of the appellant. This Court has found that the *"Tampico"* was not "sub-chartered" for her second voyage, but that appellee entered into a "contract of affreightment" with W. R. Grace & Co. In addition, both the Pacific Coast Steamship Co., the owner of the *"Tampico"*, and appellant, consented to the second voyage of the vessel.

Fifth: The breach of contract on the part of appellant occurred when appellant unlawfully terminated the second voyage of the *"Tampico"*, and the so-called doctrine of "anticipatory breach" of contract does not apply, and appellee did not enhance its damages, but minimized them. Appellee undertook a voyage that it had a right to undertake and had bound itself to undertake *both under the terms of its charter party with appellant, and its contract of affreightment with W. R. Grace & Co.*

Sixth: Appellee is entitled to the full amount of damages claimed by it and awarded to it by the District Court.

The questions enumerated by appellant are not, therefore, presented on this appeal within the rulings of this Court on the prior appeal. The sole and only question that can be presented on this appeal, and that has not already been adjudicated by this Court, is: *Had appellee entered into its contract with W. R. Grace & Co. prior to January 11, 1916;* and that fact is not even disputed by the appellant.

Argument.

THE QUESTION OF ESTOPPEL IS NOT INVOLVED IN THIS APPEAL. APPELLEE IS ENTITLED TO ITS DAMAGES UNDER THE JUDGMENT OF THIS COURT.

The language of this Court, quoted on page 10 of appellant's brief, was used by the Court only with reference to the question of whether or not appellee had entered into its contract of affreightment with W. R. Grace & Co., *on or prior to January 11, 1916.* This is evidenced by the fact that the quoted language immediately follows this statement by the Court:

> "What the contractual relations were between the appellant and W. R. Grace & Co. *on January 11* does not appear from the record. It is not shown that there was *then* a binding contract between them. The appellant's "(Sudden & Christenson)" testimony that *at that time* the vessel was fixed for the second voyage

> may mean only a fixed intention in the minds of the appellants to use the vessel for a second voyage."

It is apparent that the sole inquiry of this Court was addressed to *the time* of the contract between appellee and W. R. Grace & Co. with reference to the date of January 11, 1916 as the Court quite properly held that appellee would not be entitled to damages if it had not entered into its contract with W. R. Grace & Co. prior to the time (January 11, 1916) that it was notified that the redelivery date of the *"Tampico"* was May 15, 1916. As we have heretofore noted, there is no contention but that the contract between appellee and W. R. Grace & Co. was entered into on January 4, 1916.

The theory upon which the case was decided by this Court in favor of the appellee is evidenced by the following language:

> "In the present case, estoppel is *not* made the basis of the relief sought by the cross libel. The relief sought is based *only upon the terms of the contract between appellant"* (Sudden & Christenson) *"and the appellee"* (Crossett Western Lumber Co.) *"and estoppel is asserted only as against the defense which the appellee"* (Crossett Western Lumber Co.) *"pleaded thereto,* and we see no reason why it is not available for that purpose."

There is no force or effect in the far-fetched attempt of appellant to show that the act of the appellee in entering into its contract with W. R. Grace & Co., through its New York agents, was not committed relying upon the representations of ap-

pellant. The record stands without contradiction that the New York agents of appellee, D. B. Dearborn & Co., entered into this contract as the agents of appellee, and that the contract was that of the appellee and none other. When we take into consideration the heretofore noted fact that, acting upon the representations of the appellant, the appellee on Friday, December 31, 1915, exercised its option for the second voyage; and that on Tuesday, January 4, 1916, through its New York agents, D. B. Dearborn & Co., it entered into its contract with W. R. Grace & Co., it is quite evident that the latter act naturally and proximately followed the former. In the interim on January 3, 1916, the appellant has acknowledged receipt of appellee's notice of the exercise of the option without objection as to *any* voyage to be undertaken. It is elementary that notice to an agent within the limits of his authority is notice to the principal, and it naturally follows, and is equally elementary, that the acts, intentions and knowledge of an agent within the limits of his authority are the acts, intentions and knowledge of the principal. There can be no separation of these matters between principal and agent. There is not one word in the record which even indicates any separation in act, knowledge or intention between the appellee and its New York agents, D. B. Dearborn & Co.

It is uncontradicted, and indeed testimony is cited in this behalf on page 12 of appellant's brief, that D. B. Dearborn & Co., *as the agents of appellee,*

had for some time been conducting negotiations with W. R. Grace & Co. for the second voyage of the *"Tampico"*. If, as contended by appellant, the *agents* did not rely on the representations made to the *principal,* why then were not these negotiations consummated prior to or longer after the date that appellee exercised its option with appellant for the second voyage? It is extremely significant that these negotiations were not consummated until immediately after appellee had fixed its right to use the *"Tampico"* for a second voyage by exercising its option with appellant, and *then, and immediately thereafter,* through its New York agents, consummated its pending negotiations with W. R. Grace & Co. Throughout the record, without contradiction, it appears that it was Sudden & Christenson, and not D. B. Dearborn & Co., that contracted with W. R. Grace & Co., and it is now for the first time that appellant, in a vain attempt to avoid and defeat the effect of the decree of this Court, vainly seeks to show otherwise. Prima facie, ostensibly and actually, the record shows, *without any contradiction by appellant,* that *appellee, itself, and none other,* relying itself upon the representations of appellant, first exercised its option for a second voyage on Friday, December 31, 1915, and then consummated its negotiations with W. R. Grace & Co. on January 4, 1916.

In fact this Court has already determined these questions. It has held that on or about December 20, 1915, *Sudden & Christenson* "were negotiating

with W. R. Grace & Co. for the use of the *'Tampico'* for a second voyage"; that on December 27, 1915 Crossett Western Lumber Co. wrote to Sudden & Christenson that its charter of the *"Tampico"* from the owner "reads practically the same as that of the *'Eureka'* except that we are to make redelivery about June 15" and that the letter closed with the request that on receipt thereof the appellant (Sudden & Christenson) advise the appellee (Crossett Western Lumber Co.) of its position as to the option; that "upon receipt of that letter the appellant" (Sudden & Christenson), "closed its negotiations with W. R. Grace & Co. and fixed the vessel for the second voyage", and in so *"acting"* upon the representations of appellant, "exercised such reasonable diligence as the circumstances required."

This Court has therefore held, *upon the same record as to these facts that is now presented,* that the negotiations for the contract with W. R. Grace & Co., and the contract itself, and all intent and knowledge in connection therewith, were the acts, intent and knowledge of appellee in its own behalf, and that, as to the representation of appellant, *Sudden & Christenson,* "* * * *in acting upon it,* exercised such reasonable diligence as the circumstances required." These facts are made all the more certain by the testimony of Mr. Cahill taken on the second trial of the case:

> "Q. Prior to December 20, 1915 were *Sudden & Christenson* negotiating in any way with

W. R. Grace & Co. with reference to the *'Tampico'*?

A. Yes, sir.

Q. What were these negotiations?

A. Those negotiations were for the freighting of the cargo of nitrates from the West Coast of South America to the East Coast of the United States.

Q. On what vessel?

A. That was on the Steamer *'Tampico'.''* (Second Apostles p. 11.)

"Q. Mr. Cahill, what, if anything, did *you* do, and when, after the receipt of the letter dated January 3, 1916, that you have referred to, with reference to engaging the *'Tampico'* to W. R. Grace & Co.?

A. *We* immediately, I think possibly the following day, made a contract with W. R. Grace & Co. to move a cargo of nitrate from the West Coast of South America to the East Coast of the United States, via the *'Tampico'*.

Q. What form did that agreement take?

A. That was *confirmed* by a letter from *our agents* in New York, Messrs. D. B. Dearborn & Co., to W. R. Grace & Co."

Without question, therefore, the record shows and this Court has found that the contract between appellees and W. R. Grace & Co. was entered into in reliance upon the representations and contractual undertakings of appellant.

Appellant is going far off the record when it states that the entering into of the contract between appellee and W. R. Grace & Co. did not involve the assumption by the appellee of a new obligation or an altering of its position to its detriment. There is no evidence in the record to that effect. There is nothing of record to show that appellee

was already, or otherwise, bound to W. R. Grace & Co. so as to be liable in damages if it failed to move the cargo of nitrates ex the *"Eureka"*. As a matter of fact all right to the use of the *"Eureka"* had been relinquished by appellee in the cancelation of the sub-charter on the *"Eureka"* entered into by appellant and appellee on October 18, 1915 (First Apostles, p. *176*), the same day that the sub-charter on the *"Tampico"* was entered into between the same parties. Under the terms of its contract with W. R. Grace & Co., for the *"Eureka"*, the appellee was excused from performance by the closing of the canal.

As heretofore pointed out, this contract of affreightment between appellee and W. R. Grace & Co. provided for a voyage "via Panama Canal". Freight was stipulated at $9 per ton. The contract contained the usual mutual exception clause under which the act of God, earthquakes, inundation, perils of the sea, arrest and restraint of princes, rulers and people, etc., from the signing of the charter party to the conclusion of the voyage, were always mutually excepted.

It was further provided that

> "should the steamer not be ready to load at loading port on or before 6 o'clock P. M. on the 15th January, charterer's agents to have the option of cancelling this charter party."

The *"Eureka"* was on the Atlantic Coast and could not even proceed to her loading port on account of the fact that the canal was not open.

Whether this fact was due to an act of God, or a restraint of princes, rulers or people, it comes within the exception clause in the contract between appellee and W. R. Grace & Co. and, as such, not only entitled W. R. Grace & Co. to cancel the charter party on account of the vessel not being able to load by January 15, 1916, which was, of course, an impossibility (the fact that the ship is prevented from arriving at the loading port by an excepted peril does not deprive the charterer of the right to cancel; *Karran v. Peabody,* 145 Fed. 166; *Smith v. Dart,* L. R. 14; Q. B. D. 105) but excused the appellee from carrying out its engagement with the vessel.

When an English ship chartered for "one Baltic round" was in the Baltic at the outbreak of the European War, with the result that redelivery became impossible until the end of the war, it was held that this put an end to the charter. *Scottish Nav. Co. v. Souter,* L. R. (1917) 1 K. B. 222; 22 Com. Cas. 154.

In the case of *Atlantic Fruit Co. v. Solari,* 238 Fed. 217, it was held that where a Dutch ship under a time charter was ordered by the Dutch Government not to continue in the service of the charterers that the charter was frustrated.

> "Apart from any question of breach of contract, and under a different principle, circumstances which delay its performance may destroy the rights or obligations of both parties to the contract in a charter party or in a bill of lading. This, in regard to charter parties, is

> commonly referred to under the phrase 'frustration of the commercial purpose of the adventure', but is really a particular application of the same general principle that a contract, which by supervening and unforseen circumstances, becomes impossible of performance, may cease to bind either party to it.
>
> "The contract may be put to an end in this way whether it is still executory or has been in part already performed." *Scrutton on Charter Parties,* 10th Ed. p. 102, and cases cited.

The frustration of the adventure excuses both parties to the contract, and the shipowner, as well as charterer, may in such event decline to perform his contract. The reasons for allowing the contract to be dissolved under the new conditions apply to both parties.

> *Jackson v. Union Marine Ins. Co.* (1873) L. R. 8 C. P. p. 578; (1874) L. R. 10 C. P. p. 144.

On account of the closing of the canal, therefore, the voyage contracted for by appellee and W. R. Grace & Co. on the *"Eureka"* was abrogated, and both parties were excused from performance, for it was impossible for the vessel to perform her stipulated voyage "via Panama Canal". The *"Eureka"* was on the Atlantic Coast and the *"Tampico"* was on the Pacific Coast. The appellee entered into negotiations with W. R. Grace & Co. to carry the proposed cargo from the West Coast of South America to the East Coast of the United States on the *"Tampico"*. It also entered into ne-

gotiations with the appellant for the use of the *"Tampico"* for that purpose. These negotiations between appellant and appellee were consummated on October 18, 1915, when the sub-charter on the *"Eureka"* was cancelled and the sub-charter on the *"Tampico"* was entered into. The negotiations between appellee and W. R. Grace & Co., however, were consummated on January 4, 1916, when appellee, relying upon the representations of appellant, had exercised its option for the second voyage of the *"Tampico"* for W. R. Grace & Co. from the West Coast of South America through the Canal to the East Coast of the United States.

A different freight rate, dependent upon different contingencies, and a different voyage, also dependent upon different contingencies, were undertaken by appellee under its contract with W. R. Grace & Co. on the *"Tampico"* than had been undertaken in its contract with the same company on the *"Eureka"*.

The very exercise by appellee of its option for the second voyage, with the consequent continuation of its obligations under its charter party with appellant, and its act in agreeing to transport the cargo of nitrates for W. R. Grace & Co. from the West Coast of South America to the East Coast of the United States, which acts are inseparable and followed one from the other, is a decided alteration in its position, made in reliance upon the representations of appellant.

No matter what the contractual obligations of appellee were with W. R. Grace & Co. on the *"Eureka"*, it is apparent that this vessel could not be used for the stipulated voyage, and that, on one hand, the appellee was excused from performance on account of the impossibility thereof under the terms of its contract, and that W. R. Grace & Co., for the same reason, was likewise excused; and, on the other hand, that under the terms of the contract W. R. Grace & Co. had the right to the cancellation of the agreement on account of the failure of the vessel to proceed to her loading port on the West Coast of South America by January 15, 1916. If, then, even in compromise of that situation, the appellee entered into its second contract with W. R. Grace & Co. for the use of the *"Tampico"* on her second voyage, it is undoubtedly true that appellee altered its position and assumed responsibilities and liabilities to its injury, in reliance upon the representations of appellant that the *"Tampico"* would be available for the agreed upon voyage.

This is very much more than sufficient for it is the rule that to constitute an estoppel it is not necessary that the party seeking to avail himself of the estoppel should have been induced to enter into a contract legally binding. It is sufficient if he has been induced by the words or conduct of the other party to act upon the belief that a certain thing was true and that he would be prejudiced if the other party were allowed to assert the contrary.

Lawson v. Biller, 88 Ky. 599; 11 S. W. 602.

Looking at the situation from another viewpoint it is equally apparent, in view of the representations made *by appellee to appellant* that the second voyage of the *"Tampico"* would be for W. R. Grace & Co. to the Atlantic Coast and the exercise, by appellee, of its option for that second voyage, that *appellee was bound to appellant* to complete that voyage. *Appellant* would have had the right to rely upon such undertaking on the part of appellee and to make its arrangements accordingly and could have held appellee responsible if it had thereafter changed its mind (as appellant has attempted to do) and had sought to deviate from its agreement to the detriment of appellant after the rights of the parties had been fixed by the exercise of the option for the second voyage. The rule established by the facts must, of necessity, work both ways. There can be no contradiction of the plainly evident fact that appellee in entering into its contract with W. R. Grace & Co. in reliance upon the representations and contractual undertakings of appellant, altered its position to its injury.

This question as to the alteration of appellee's position is, however, not pertinent on this appeal, for, as we have heretofore stated, this Court has held that the appellee *did* contract with W. R. Grace & Co. in reliance upon appellant's representation and contractual undertakings and has held that the only question or contingency upon which appellee's right to damages depends was whether or not the contract of affreightment between ap-

pellee and W. R. Grace & Co. had been entered into on or prior to January 11, 1916.

In the opinion of this Court on the prior appeal, the only thing lacking in the record was *the time* of the entering into of the contract of affreightment between appellee and W. R. Grace & Co. and the present record shows, and the District Court has found, and properly so, and there is no contradiction of the fact, that this contract was entered into on January 4, 1916, prior to the time mentioned by this Court, to-wit, January 11, 1916.

The case of *United States v. 422 Cases of Wine,* 1 Pet. 547; 7 L. Ed. 257, cited on page 16 of appellant's brief, is pertinent therefore, *not* in support of any contention that appellant has advanced, but in support of our contention that this Court will not again consider, and that there is not open on this appeal, the various questions that we have referred to as having been definitely finally and conclusively determined by this Court.

This Court, as we have heretofore stated and reiterated, only made inquiry as to the time of the contract between appellee and W. R. Grace & Co. This has been supplied on the second trial of the case, and for that reason the case of *Westfall v. Wait,* 165 Ind. 353, cited on pages 16 and 17 of appellant's brief, does not apply, and the same is true of *Standard Sewing Machine Co. v. Leslie's,* 118 Fed. 557, and *King v. Lagrange,* 61 Cal. 231.

On page 17 of its brief, appellant assumes, and assumes properly, that it is responsible in damages

for its breach of contract, although it states it in a little different language, pursuant to its endeavor to put a strained and incorrect construction upon the decree of this Court. It then inquires whether or not the agreement that appellee made with W. R. Grace & Co., relying upon the representations of appellant, was one that it had a right to make.

Again we find that this Court, *with the same record before it as to these facts,* has said:

> "One of the defenses asserted by the appellee" (Crossett Western Lumber Co.) "to the damages claimed upon the cross libel is the fact that the appellant (Sudden & Christenson) sublet the *'Tampico'* to W. R. Grace & Co. without the consent of the appellee" (Crossett Western Lumber Co.), "the charter between the appellant and appellee having provided 'charterers to have the option of subletting the steamer provided consent of owners obtained' and Mitchell, the manager of the appellee" (Crossett Western Lumber Co.) "having testified that the appellee" (Crossett Western Lumber Co.) "never consented to any subcharter. To this it is to be said *that it does not appear from anything in the record that the appellant"* (Sudden & Christenson) *"did in fact subcharter the vessel to W. R. Grace & Co., or that it entered into any agreement with that company other than a contract of affreightment.* It appears also that the letter of the appellant" (Sudden & Christenson) "to the appellee" (Crossett Western Lumber Co.) "of December 20, 1915, advised the appellee" (Crossett Western Lumber Co.) "that the appellant" (Sudden & Christenson) "proposed to use the *'Tampico'* in performing its obligation to W. R. Grace & Co., *and that no objection was made by the appellee"* (Crossett Western Lumber Co.).

The same record now before this Court, of course equally fails to show that appellee did in fact "sub-charter" the vessel to W. R. Grace & Co. or that it entered into any agreement with that company other than a "contract of affreightment".

We have already called the attention of the Court to the fact that from or prior to December 20, 1915, down to the time when the Pacific Coast Steamship Co. demanded redelivery of the *"Tampico"* on May 15, 1916, the appellant knew and did not object to the fact that this vessel was to be used for carrying a cargo of nitrate for W. R. Grace & Co. from the West Coast of South America to the East Coast of the United States, and *was to be substituted for the "Eureka"*. Its present contention in this particular is a repudiation of its obligations similar to its former contention on the first appeal that it was not bound by its representations and agreements. The Pacific Coast Steamship Co. itself, the owner of the *"Tampico"*, consented to the second voyage of the *"Tampico"* (First Apostles, page 46). That consent must have been effected through the appellant.

Mr. Mitchell himself admits that the appellant consented to the "sub-charter" of the *"Tampico"* by the appellee, and then when prompted by counsel seeks to withdraw that admission.

> "Mr. Montgomery. I will withdraw that question and ask: Q. What are the facts with reference to whether or not the Crossett Western Lumber Co. ever consented *to a sub-chartering* of the Steamship *'Tampico'* by Sud-

> den & Christenson, the cross libelant in this controversy?
>
> A. Under the conditions that they would return the ship to Pacific Coast ports, not via the Atlantic Coast ports.
>
> Mr. MONTGOMERY. Repeat the question. The answer is not responsive. (Note: We submit that it was decidedly responsive.) (The last question was thereupon read.)
>
> A. We never consented to any sub-charter."
>
> (First Apostles, p. 53.)

Appellant thus seeks to qualify its permission to "*sub-charter*" the "*Tampico*" as it has attempted to qualify its consent and agreement under the charter party that the vessel proceed to and be redelivered at an Atlantic Coast port, and as it has endeavored, and now endeavors, to qualify all of its acts and contractual breaches that have caused the damage to appellee. Its entire course of action throughout this controversy has been one of violation of contractual obligation with attempted qualification thereof as an afterthought. It has not so far succeeded in qualifying its obligations or the result of its breaches of contract, and we feel sure that it will not now be permitted to succeed in its attempt to qualify the decree of this Court.

The law is elementary on this point. The record clearly shows a consent and an agreement under the charter party on the part of appellant that the vessel be employed as it *was* employed on its second voyage. Even without that consent and agreement, the mere silence of the appellant, when it was its

duty to object to the proposed second voyage, would render it responsible in damages to the appellee and estop it from seeking to avoid the consequences arising from that silence.

Where a person, knowing the facts, remains silent when he ought to speak and make known the truth, and where his silence is calculated to prove misleading and disastrous to an innocent party who acts in good faith upon the appearance of the situation, assuming the silence of the other party to be in conformity with the facts, equity and good conscience will estop the party who remains silent from thereafter asserting the real facts when to do so would work a fraud upon such innocent party.

Farber v. Page & Mott Lumber Co., 20 Idaho 354; 118 Pac. 664.

In the case of *Douglas & Varnum v. Morrisville,* 84 Vt. 302; 79 A. 391, it was held that if one party to a contract knowingly leads the other, even by silence, to believe that when he executes the agreement that a certain construction will be put upon it, he is estopped thereby from gainsaying that construction to the prejudice of the other party.

In the case of *Flesner v. Cooper,* 162 P. 1112, the Court lays down the rule that the false representation, *or concealment of facts,* as an element of an equitable estoppel, *may arise from silence* of a party under imperative duty to speak.

The failure to speak when there is an opportunity so to do is often the strongest proof of waiver or estoppel.

Pac. Commercial Co. v. Northwestern Fisheries Co., 197 P. 930.

It is not necessary, however, that the maintaining of silence, or failure to speak, must be intentional or deliberate in order to work an estoppel, for it was held in the case of *Kantor v. Cohn,* 164 N. Y. S. 383; 98 Misc. Rep. 355, that an estoppel by conduct arises as well where a party is silent, because of ignorance, and such ignorance amounts to negligence, to the injury of another, as when he has knowledge and is under a duty to speak and fails to do so.

This Court has already held, and indeed there is no question of the fact, that the appellant, not only had agreed to the second voyage of the *"Tampico"* but, with the knowledge or means of knowledge in its possession as to the time and place of the redelivery of the *"Tampico"* to its owner, nevertheless did not object to the second voyage of the vessel for W. R. Grace & Co. from the West Coast of South America to the East Coast of the United States. Under the authority of the cases above cited, this silence alone would work an estoppel against the appellant. The record shows, however, that, as heretofore noted, the appellant, and indeed the owner, had agreed and later consented to the second voyage of the *"Tampico"*. It is plainly apparent, therefore, that the appellant cannot now

avoid the consequences of its agreement and consent that the *"Tampico"* be employed as it *was* employed on its second voyage, and that in any event its action in keeping silent, when it was advised of the intentions of the appellee with reference to the second voyage of the *"Tampico"*, would prevent it from now claiming that the appellee violated its agreement in engaging the vessel to W. R. Grace & Co.

IT IS THE FACT, AND THIS COURT HAS HELD WITH THE SAME EVIDENCE BEFORE IT AS TO THESE FACTS, THAT THE CONTRACT BETWEEN APPELLEE AND W. R. GRACE & CO. WAS MERELY A "CONTRACT OF AFFREIGHTMENT".

The contract between appellee and W. R. Grace & Co. is embodied in the letter of January 4. 1916 from appellee, through its agents, to W. R. Grace & Co. (Second Apostles, page 16). This letter consummates the then pending negotiations between the appellee and W. R. Grace & Co. and provides for the cargo, the voyage (dependent upon the conditions therein stipulated) and the freight rate (dependent also upon the contingencies therein stipulated). Reference is made to the substitution of the *"Tampico"* for the *"Eureka"* and the former agreement between the same parties is submitted with the letter *for reference* (Second Apostles, page 17). The terms of the contract between appellee and W. R. Grace & Co. are thereby completely stated and provided for. How, by any construction of the facts, can this contract be considered a sub-charter.

It is merely an engagement upon the part of the appellee to transport a cargo of nitrates for W. R. Grace & Co. from a designated loading port on the West Coast of South America, through the Canal, to a designated port of discharge on the East Coast of the United States at a stipulated rate of freight per ton. In the event that the Canal is closed at the time that the vessel is ready to leave her loading port, the voyage is to be to San Francisco at a less rate of freight. The Canal having been open at that time, the latter contingency never arose.

Appellant is guilty of a very strained construction of the facts when it seeks to employ from the use of language by laymen in entering into a contract on a printed "form" or in testifying as to *facts* that a legal relationship existed that did not in fact exist.

Appellant is just as far afield when it seeks to take advantage of the language of counsel in the stipulation appearing on page 10 of the second apostles, and on page 143 of the first apostles. This Court has failed to find and we fail to find anything in the record that would indicate a "sub-charter" of the *"Tampico"*.

It must also be borne in mind that D. B. Dearborn & Co. were the agents of appellee for the "handling" of vessels as well as for the chartering of vessels, so that it can hardly be presumed, as appellant contends, that merely because the contract was closed by these agents of appellee the contract must have been a "charter".

It is therefore plainly apparent that the appellant not only did not object to, but had agreed and later consented to, the entering into of the contract between appellee and W. R. Grace & Co., and this Court has held, *with the same facts before it in this behalf,* that this contract was no more than a "contract of affreightment". Whether sub-charter or contract of affreightment, however, appellant cannot now, in the face of its representations, agreements and consent, repudiate its obligations to the detriment of appellee who, in good faith, has acted to its injury in reliance upon equal good faith on the part of appellant. This is *res adjudicata.*

NON-APPLICATION OF THE SO-CALLED DOCTRINE OF "ANTICIPATORY BREACH."

On pages 20 to 23 of its brief, appellant seeks to apply to the facts of this case what it calls the doctrine of "anticipatory breach". This doctrine is one that so far as we have been able to ascertain has never been applied to a situation such as is involved in the case at bar. It is a doctrine that has been most frequently applied to insurance cases. Strictly speaking, a cause of action is the wrongful invasion of a private right, for which law or equity affords the injured person redress against the wrongdoer; and whether it be *ex contractu* or *ex delicto,* the cause cannot accrue until a wrong has been committed. *Sperry v. Cook,* 120 S. W. 654, 138 Mo. App. 296.

It has also been held that a person in mere anticipation that an actionable private nuisance may result from the operations of another, cannot maintain an action at law or in equity against such person in respect thereto. *Priewe v. Fitzsimmons & Connell Co.,* 117 Wis. 497, 94 N. W. 317.

In the case of *Alvey Ferguson Co. v. Ernst Tosetti Brewing Co.,* 178 Ill. App. 536, it was held that a mere notice of an intended breach of a contract is not of itself a breach, although it may become so *if accepted and acted upon as such by the other party;* yet, *if not so accepted and acted upon,* the notice remains only a matter of intention and may be withdrawn at any time before performance is in fact due.

In the case of *Provident Savings Life Assurance Society v. Ellinger,* 164 S. W. 1024, the rule is laid down that a contract can be breached in only one of three ways; by failure to perform, by positive declaration of and intention not to perform, *and acceptance by the other party,* and by inability to perform.

It is evident, therefore, that in attempting to apply this doctrine to the issues of the case at bar, appellant has overlooked the essential element that a notice of breach of contract, in order to itself constitute the breach, *must be accepted, treated as such, and acted upon by the other party.*

It is elementary that "a mere assertion that the party will be unable, or will refuse, to perform his

contract is not sufficient; it must be a distinct and unequivocal, absolute refusal to perform the promise *and must be treated and acted upon as such by the party to whom the promise was made.*" *Benjamin on Sales,* Sec. 568.

The above cited quotation from *Benjamin* is contained in the opinion in the case of *Rauer v. Harrell,* 32 Cal. App. 67. In further support of the same rule the Court in the case cited states the following rule from *6 Ruling Case Law, page 1025:*

> "In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract, or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute. * * * It may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. *It is not a breach of the contract unless it is treated as such by the adverse party.*" Citing *Hansen v. Slaven,* 98 Cal. 377; *Bell v. Bank of California,* 153 Cal. 234.

The Court, in rendering its opinion in *Rauer v. Harrell,* further cites the rule laid down in *Smoot's case,* 15 Wall. 36, (21 L. Ed. 107) to the effect that the mere assertion that the party will be unable, or will refuse, to perform his contract is not sufficient to terminate it; it must be a distinct and unequivocal, absolute refusal to perform, treated and acted on as such by the promise.

This rule was approved in *Dingley v. Oler,* 117 U. S. 503; 29 L. Ed. 984.

As we have heretofore shown from December 20, 1915, and indeed prior thereto, down to January 10, 1916, appellant was advised as to the second proposed voyage of the *"Tampico"* and made no objection and, in fact, consented thereto. Relying on this course of conduct on the part of appellant, the appellee exercised its option for the second voyage and entered into a contract of affreightment with W. R. Grace & Co. on January 4, 1916. It was not until *after* the appellant had received notice from the Pacific Coast Steamship Co. that redelivery of the vessel would be required *on the Pacific Coast by May 15, 1916,* instead of on the Atlantic Coast by June 15, 1916, that on January 11, 1916, it endeavored to reverse its position and repudiate its contractual obligation with appellee.

Appellant contends that, merely because it wired to appellee on January 10, 1916 that "under no circumstances can we allow *"Tampico"* to go to Atlantic Coast" (Appellant's Brief, page 21), that, notwithstanding that appellee had at that time already bound itself to W. R. Grace & Co. to carry a cargo of nitrate from the West Coast of South America to the East Coast of the United States, the breach of contract between appellant and appellee occurred upon the sending of that wire, and that therefore the appellee should not, although bound thereto by its contract with W. R. Grace & Co., have sent the *"Tampico"* on its second voyage, and having done so can recover as damages, the market value of the nitrate cargo in New York less the cost

in South America and less the freight, instead of the loss that it has actually suffered.

In advancing this contention, appellant has, as we have heretofore pointed out, overlooked the absolute prerequisite to the application of the doctrine of anticipatory breach established by the authorities above cited, and that prerequisite is that the other party, (the appellee in this case) *must accept, treat as such, and act upon* the "anticipatory breach". It is without contradiction that the appellee neither accepted, treated as a breach, nor acted upon the said telegraphic notice of such breach given by appellant. On the contrary, it elected, as the law permits it to elect, to stand on the contract and endeavor to carry it through, and the breach of contract by appellant took place when appellee was prevented from carrying out the stipulated voyage and the vessel was wrongfully taken from its possession on May 19, 1916. The doctrine of "anticipatory breach" has, therefore, no application to the case at bar..

In connection with its argument in this behalf, appellant says, in addition, on pages 22 and 23 of its brief that it must have been the real intention of appellee to transport the cargo of nitrate for W. R. Grace & Co. from the West Coast of South America *to San Francisco,* notwithstanding its contract with W. R. Grace & Co. to carry the cargo from the West Coast of South America *to the East Coast of the United States.*

The contract between appellee and W. R. Grace & Co. appears on page 16 of the new apostles as follows:

"January 4, 1916

Messrs. W. R. Grace & Co.,
New York City.
Dear Sirs:—

Attention Mr. Fischer. Yours of the 3d received.

'Tampico' We confirm your statement that this steamer is substituted for the *'Eureka'* and if the canal is closed when she is ready to sail from nitrate port she is to proceed to San Francisco with one dollar per ton less freight than via the canal, say $8 per ton.

Very truly yours."

It is uncontradicted that the canal was open when the *"Tampico"* was ready to sail from the nitrate port. This contract, by reference to the contract between the same parties on the *"Eureka"* which was submitted therewith, (Second Apostles, page 17) provided for a voyage from the West Coast of South America, through the canal, to the East Coast of the United States with freight at the rate of $9 per ton. It then provides that in the event that the canal is closed at the time the vessel is ready to leave the nitrate port that, instead of the stipulated voyage, she may proceed to San Francisco at a less rate of freight. The canal, having been open at the time the *"Tampico"* was ready to leave the nitrate port, it became the absolute engagement of appellee to transport the cargo from the West Coast of South America, through the

canal, and deliver it on the East Coast of the United States.

It may be, as contended by counsel, that the fact that the canal was open when the *"Tampico"* was ready to leave the nitrate port was the result of an accident to the vessel, or unforseen contingency, but this accident or contingency fixed the absolute responsibility of the appellee to carry out the stipulated voyage through the canal, and is the very contingency in anticipation of which the parties contracted and it is because appellee had entered into this contract with W. R. Grace & Co. that the *"Tampico"* was sent on her second voyage.

The measure of damages contended for *by appellant* in its brief has never been applied to a case such as is here presented. The District Court on the second trial has held, and held properly, that the damages claimed by appellee are supported by the evidence and estimated pursuant to a proper measure of damages.

AMOUNT AND MEASURE OF DAMAGES.

It is the unquestioned fact that at no time during the course of the first trial, in the brief submitted to this Court on the appeal, nor on the second trial of this case, has the correctness and propriety of this account, the amount thereof, or its items, been questioned by appellant.

The elements and items of appellee's damages and the statement and account thereof appear in the

deposition of the witness Cahill and are as follows (First Apostles, pages 125-129):

Q. What loss, if any, did Sudden & Christenson sustain by reason of the action of Crossett Western Lumber Company in withdrawing the *'Tampico'* from your service prior to the end of her second voyage?

A. We lost $14,871.50.

Mr. LILLICK. Q. Counsel for Crossett Western Lumber Company has objected to your testifying to that loss, upon the ground that it calls for your conclusion with reference to that loss. State upon what you base the computation.

A. On the amount charged by W. R. Grace & Co. for the steamer having delivered the cargo at San Francisco instead of the Atlantic Coast; on the expense of operating the steamer to San Francisco instead of on the Atlantic Coast; also in accordance with the charter-party, we were to receive from the Crossett Western Lumber Company 2½ percent of the charter hire if the steamer was delivered back to them by us on the Atlantic Coast.

Q. That in a general way is the basis upon which you computed the amount. Will you state in detail, if you have the computation, how each item of the loss is made up, so that the total which you have stated is arrived at?

A. Taking the engineer's log as a basis as to the consumption and the speed of the vessel, and taking the mileage as a basis, the steamer was 4⅙ days longer in coming to San Francisco than she would have been had she gone to New York. The steamer, according to the engineer's log, burned an average of 3.737 barrels of fuel oil per hour. The steamer lost, on account of putting into San Pedro, due to shortage of provisions, 13 hours and 52 minutes. W. R. Grace & Co., as charterers for whose account we were freighting the nitrate, charged $4.70 per ton on the whole cargo of

2,787 tons. Against that we allowed a credit to the Crossett Western Lumber Company of the expense of sending the steamer through the Panama Canal, tolls which are as follows: Panama Canal tolls for time occupied in transit through the Canal; fuel consumed in transit through the Canal. On that basis I figured the loss.

Q. Have you those figures carried out on the memorandum from which you are apparently reading, so that you can state them in such form that they can be taken down in your deposition?

A. Yes.

Q. Will you read them into the record, please?

A. 'Steamer Tampico. Loss sustained by Sudden & Christenson account delivery cargo San Francisco instead of New York.' Callao being the last port of call, the figures below are calculated as from Callao. From Callao to San Francisco *'Tampico'* covered 4098.4 miles in 530 hours: consumed 1981 barrels of fuel oil. Average 7.73 miles per hour or 3.737 barrels of fuel oil per hour. Callao to San Francisco, 4098.4 miles at 7.73, 530 hours. Callao to New York 3320 miles at 7.73, 430 hours. Excess, 778.4 miles at 7.73, 100 hours, or 4⅙ days.

Excess time coming to San Francisco, as above, 4⅙ days at $325.00	$ 1,354.25
Fuel, 100 hours at 3.737 barrels per hour, at $2	747.40
Time lost in San Pedro fueling, 13 hours, 52 minutes, at $325.00	188.24
Commission, 2½% on charter hire, $67,540.39 at 2½%	1,688.50
Deducted by charterers from freight money account delivery of cargo at San Francisco instead of New York, 2787 tons nitrate at $4.70 per ton	13,098.90
	$17,077.29

Less Panama Canal tolls, 1654 net tons at $1.25	$2,067.50	
Usual time occupied in transit through Canal 8 hours, at $13.54	108.32	
Usual fuel consumed in transit through Canal, 4 hours at 3.737, 14.948 barrels at $2.	29.90	2,205.72
Leaving a balance due of		$14,871.57

Q. Has demand been made upon W. R. Grace & Co. for the payment to Sudden & Christenson of the amount named in the charter for the transportation of this nitrate?

A. Yes, sir.

Q. Has anything been paid by W. R. Grace & Co. to Sudden & Christenson on account of that?

A. Not to my knowledge.

Q. Do you know whether it has been?

A. I know it has not been.

Q. Your position is such in the company that had it been paid you would know it?

A. Yes."

Mr. Cahill's testimony, given on the second trial, in connection with this account, appears on pages 20 and 21 of the Second Apostles, as follows:

"Q. I hand you the said Apostles on appeal" (First Apostles) "and call your attention to a statement of account or of loss and damage covering the loss and damage claimed by Sudden & Christenson on account of the alleged action upon the part of Crossett Western Lumber Company in directing the *"Tampico"* to return to San Francisco for redelivery on or about May 15, 1916, instead of proceeding on her voyage for W. R. Grace & Co., to the East Coast of the United States

for redelivery on or about June 15, 1916, which statement of account and statement of loss or damage appears on pages 127, 128 and 129 of the said apostles on appeal, and I ask you if that statement is in each and every particular correct, and is a statement of the loss and damage by Sudden & Christenson on that account?

A. Yes, it is.

Q. Is that statement made up in the usual and customary method in the course of your business, and of the business of firms in a similar line of business?

A. Yes, sir.

Q. Was there an additional amount with reference to which you suffered loss or damage on account of the vessel being off hire during the charter term?

A. Yes.

Q. What is that amount?

A. $2477.27.

Q. So that the total damage suffered by you is the balance due shown in the statement which you have referred to, of $14,871.57, plus the amount that you have just stated, $2477.27?

A. Yes.

It is significant to note that counsel for appellant did not object, even upon the introduction of this testimony on the second trial, as to the competency or relevancy thereof, as to the propriety of the measure of damages therein stated, as to the knowledge of the witness in regard thereto, or in any other manner or particular whatsoever. From the inception of these proceedings up to the present time, this account has been practically conceded to be correct, and it is only now, in a last minute attempt to render impotent the judgment and decree of the Court, that appellant seeks to

attack this account. *Appellant has never offered or sought to offer evidence contradicting or even touching upon the amount or measure of damages claimed by appellee.* Even the objection to Mr. Cahill's testimony with reference to this account, given at the first trial, noted on pages 26 and 27 of appellant's brief, goes only to the alleged fact that the witness is alleged to have had no personal knowledge of the accuracy of the account, and in no way attacks the propriety of the account, or its items, or the measure of damages pursuant to which it was prepared. On the second trial, Mr. Cahill testified positively (and his testimony was not attacked either by objection or cross-examination or otherwise) that the statement is in each and every item correct and is a statement of the loss and damage by Sudden & Christenson, and that it was made up in the usual and customary method in the course of appellee's business and of the business of firms in a similar line of business.

Appellant attacks only one item of the account—that of $13,098.90, deducted by charterers from freight money account delivery of cargo at San Francisco instead of New York, 2787 tons nitrate at $4.70 per ton. Although the statement of account appearing in the record (First Apostles, pages 127 and 128) is entirely clear as to its terms, it may be of some assistance to the Court to briefly explain the various items thereof.

Excess time coming to San Francisco $1354.25.

The record shows (First Apostles, page 127) the difference in the distance and time consumed between the port of Callao, the last port of call, (whether the vessel proceeded to New York or to San Francisco) to be an excess of 778.4 miles at 7.73 miles per hour, 100 hours, or 4 1/6 days, at the charter rate of $325 per day.

Fuel—$747.40.

3.737 barrels of oil at $2.00 per barrel are shown to have been used per hour during the excess time of 100 hours.

Time lost in San Pedro—$188.24.

This lost time is estimated at the rate of charter hire.

Commission on charter hire—$1688.50.

Clause 30 of the charter party (First Apostles, page 14) provides that 2½% commission is due on the amount of the charter money to Sudden & Christenson but that, should delivery be made on the West Coast of North America, Sudden & Christenson should not receive said commission. Under cross-examination on page 131 of the First Apostles, the witness Cahill states that Sudden & Christenson were to get 2½% of the total freight money if the steamer was delivered on the Atlantic Coast. Inasmuch as the steamer was delivered on the Pacific Coast on account of the wrongful acts of Crossett-Western Lumber Co., Sudden & Christenson were

deprived of this commission to their damage in the amount thereof.

Deducted by charterers from freight money on account of delivery of cargo at San Francisco instead of New York $13,098.90.

The charterers referred to are, of course, W. R. Grace & Co., who held Sudden & Christenson responsible for their failure to deliver the nitrate cargo on the Atlantic Coast. Mr. Cahill testifies that Sudden & Christenson received nothing from W. R. Grace & Co., for carrying the nitrate cargo (First Apostles, page 125). It further appears that the amount of this item was charged to Sudden & Christenson by W. R. Grace & Co., because the cargo was delivered at San Francisco instead of on the Atlantic Coast and as the actual cost of transshipment to the eastern destination, and that W. R. Grace & Co., have withheld this amount from Sudden & Christenson (First Apostles, page 131). It is therefore clearly shown that this sum of $13,098.90 is the actual loss of Sudden & Christenson as charged to them and withheld and collected by W. R. Grace & Co., and is the damage actually sustained by Sudden & Christenson on account of the misdelivery of the cargo at San Francisco, caused by the acts of Crossett-Western Lumber Company, *and Mr. Cahill testified positively to this fact on the second trial without attack or contradiction by appellant* (Second Apostles, pages 20, 21).

The account then shows three credit items in favor of Crossett Western Lumber Co., giving the

last named company the benefit of nonpayment of canal tolls, saving of time on account of not going through the canal, and saving of fuel on account of the same cause. These credits are included in the account for the obvious reason that Sudden & Christenson did not have to pay out these amounts. There is thus shown a balance due to Sudden & Christenson of $14,851.57. To this amount must be added the sum of $2477.27 due on account of the vessel being off-hire from April 3, 1916, to April 11, 1916. The stipulation of facts contained in the record provides that the last mentioned charge is on account of time off the charter under Par. 17 of the charter party, being the time that the vessel was off-hire from 12:45 p. m. April 3, 1916 to 3:40 p. m. April 11, 1916, total, 7 days, 14 hours, 55 minutes, at $325 per day, the rate of charter hire (Apostles, pages 194, 195). The stipulation is further to the effect that prayer had been made by Sudden & Christenson to be permitted to amend its pleading if the Court felt such an amendment necessary to properly present the amount of its claim which included this item. Pursuant to the suggestion of the District Court the amendments have been made to appellees' answer and cross-libel (Second Apostles, pages 26-30). In addition the testimony shows that the vessel went ashore on the coast of Peru and remained off-hire for the said time on account of said stranding (Apostles, page 125).

On the basis of this account, and the testimony in connection therewith, the District Court on the second trial awarded the unpaid charter hire to appellant in the sum of $6015.61, being $8492.88, the stipulated amount, less the said sum of $2477.27 due appellee on account of off-hire; and awarded to appellee its said damages in the sum of $14,851.57, directing that a decree be entered for appellee for the difference in the sum of $8799.96, with interest at 7% per annum from May 19, 1916, the date when appellant took over possession of the *"Tampico"* at San Francisco (Stipulation of Facts, First Apostles, page 143).

It is the conceded fact that upon the withdrawal of the *"Tampico"* by appellant, during the second voyage, appellee was forced to bring *to San Francisco* a cargo that it had agreed to carry *to the Atlantic Coast,* and that it was unable, by reason of its said agreement with the owners of the cargo, to collect freight money because of such misdelivery, (First Apostles, pages 125, 128 and 129). The amount charged against appellee on account of such misdelivery represents the added cost of transporting the cargo to its agreed destination over the cost that would have been paid if the cargo had been transported as agreed. The added cost is the cost of transshipping the cargo from San Francisco to its ultimate destination. Appellee is in the position, therefore, of having had to pay the additional cost of transportation made necessary by the wrongful withdrawing of the *"Tampico"* from the agreed

upon voyage and the item of the account, based upon the deduction by W. R. Grace & Co. from freight money on account of the misdelivery of the cargo, is based upon the discrepancy in the freight rates between San Francisco, as a port of destination, and the ultimate port of discharge as a port of destination.

The appellee and W. R. Grace & Co. by stipulating for a delivery of the cargo at New York at $9 per ton, and then stipulating that *if the canal was closed* that the cargo should be delivered at San Francisco at $8 per ton, have not fixed, nor endeavored to fix, the measure of damages arising out of the misdelivery of the cargo at San Francisco which was due to appellant's breach of contract, for it was the fact that the canal was not closed, but open. It is only fair to assume that W. R. Grace & Co., having contracted with appellee for the delivery of the cargo at New York, in the event that the canal was open, made its own arrangements accordingly.

Appellee's claim for damages is not, as stated by counsel, based upon *the assumption* that W. R. Grace & Co., wanted the nitrate cargo in New York, but upon *the fact* that an agreement to transport the cargo had been entered into, nor does the measure of damages which appellant, in its brief, *says* would have been applicable in the event that the cargo had been lost in transit apply to the issues in the instant case, for, in the instant case, the measure of damages that applies is the one that

has been universally applied to misdelivery of cargo and failure to carry and deliver as agreed as established by the authorities hereinafter cited.

Appellant admits, in quoting Mr. Cahill's testimony on page 30 of its brief, that the item of "deduction for misdelivery" is based upon the added cost of transportation from San Francisco to the ultimate destination of the cargo. If the cargo was not transported all the way to New York by virtue of a compromise arrangement between appellee and W. R. Grace & Co., appellant has benefitted thereby, and appellee's damages have been minimized.

This Court sent this case back to the District Court for the sole purpose of ascertaining whether or not the contractual relationship was entered into between appellee and W. R. Grace & Co., prior to January 11, 1916, and if so, to then assess the damages. There is no contention but that it was entered into on January 4, 1916, and this Court did not find, as appellant groundlessly insists, that the evidence of damages submitted on the prior appeal was insufficient.

On pages 33 to 37 of its brief, counsel submits quotations from various authorities by which it attempts to show that the measure of damage in this case should be the difference between the market value of the cargo at the point of shipment and the market value it would have had at the place of destination, less freight. In citing these authorities, appellant overlooks the fact that this case

is not one of failure to transport *with the goods remaining at the loading port,* but is a case of failure to transport as agreed and *misdelivery* of cargo carried *with the goods being transported by another agency.* This situation was the one that existed between appellee and W. R. Grace & Co. and is naturally and proximately the situation between appellee and appellant, wherein the former is attempting to recover from the latter the damages occasioned by appellant's breach of contract and unwarranted termination of and interference with the agreed upon second voyage of the *"Tampico".*

The misapplication of the said authorities quoted by counsel to the issues of the case at bar, and the fallacy of appellant's contentions as to the proper rule of damages and of its attack upon the items of the account of damage of record for which recovery is sought, is best evidenced by the case of the *"Oregon",* 55 Fed. 666. In that case the Court speaking through Judge Taft says on pages 673, *et seq:*

> "One of the chief objections by appellants to the decrees appealed from is the measure of damages enforced thereby. It is said that the correct measure is the difference between the market values of the two cargoes of ore at Cleveland and Marquette, less the contract rate of freight; whereas, the measure adopted by the Courts below was the difference between the contract rate of freight and the rate of freight which the libelant actually paid to transport the ore. *Damages for breach of contract should be such compensation as will re-*

store the injured party to the same pecuniary condition that he would have been in had the contract been performed. Where one contracts with a carrier to transport ordinary merchandise, having a market value, from one point to another, the profit which both he and the carrier may reasonably expect him to make out of the transaction is the difference between the market value of the merchandise at the point of destination and the market value at the point of shipment, less the freight under the contract. The pecuniary difference between the shipper's condition with the contract performed, and his condition *if the merchandise is not shipped but remains at the point of shipment,* is this profit which is therefore his legal damage. But it is a general rule that it is the duty of one party to a contract which has been broken by the other to use reasonable diligence to reduce the damages arising from the breach.

If, therefore, in cases of freight contracts, a carrier refuses to perform, it is the duty of the shipper, if he can reasonably expect thereby to reduce his loss, to seek other means of transportation and perform the contract himself. *In such a case, the difference between his actual pecuniary condition and that in which he would have been had the carrier transported the goods under the contract is not the profit which he would have made had the contract been performed, for the contract has been performed and he has acquired the opportunity to sell his merchandise at the market value prevailing at the place of destination, but it is the increased expense of performing the contract—that is, the difference between the contract rate of freight and the freight which he was actually obliged to pay to secure performance,* and it would seem to be a good defense against a claim for profits lost by breach of a freight contract that the shipper could have

saved himself, or at any rate could have reduced his loss by employing other means of transportation.

This may be hardly consistent with Chief Justice Taney's opinion in *Harrison v. Stewart; Taney 485, but it is in accordance with the weight of modern authority.* 2 *Sedg. Dam.* (8th Ed.), Sec. 482. In such a case it would be necessary for the defendant to show that the shipper could reasonably expect to reduce his loss by other transportation. *But it would hardly seem so necessary, in order to justify the shipper in seeking other means of transportation and charging the carrier with the increased freight, for him to show either that the profit from the executed contract would have equalled or exceeded the increase in the freight.* When the shipper contracts with a carrier to transport merchandise, he is legally entitled to have his merchandise carried without regard to the question of whether the transaction would have been profitable to him or not. Were the contract one which justified a resort to a Court of Equity for its specific performance, it certainly would not defeat the relief prayed for that the result would be unprofitable to the complainant."

"An examination of the authorities shows that in all cases where the measure of damages for a failure or refusal of the carrier to receive goods tendered for shipment under a contract has been held to be the difference between the market value of the goods at the destination and their market value at the point of shipment, less the contract price of the freight, *the shipper has not attempted to perform the contract by procuring transportation by other means.*" (Citing cases.)

"*But, where the goods, not received by the contracting carrier, are transported by another at a higher rate than the contract price, this*

measure is not adopted. In such a case the goods, it may be, are brought at the same time into the same market and sold for the same market price as if carried under the contract, but it costs more to get them there. Under these circumstances, neither reason nor authority leaves any doubt that, within the limitation already referred to, if the substituted means of transportation shall be reasonable and not extravagant, *the measure of damages is the difference between the contract and the actual price of freight.*" (Citing cases.)

See also *Lumberman's Mining Co. v. Gilchrist,* 55 Fed. 677.

Applying the rule laid down in the above cited opinion to the facts of the case at bar, it appears that this case is not one of a refusal of a carrier to transport merchandise that it had contracted to carry, with the goods consequently remaining at the loading port, but a case where the goods were actually transported by another agency and arrived at their originally intended destination *but at an increased cost;* to-wit: $4.70 per ton from San Francisco to ultimate destination. The whole theory upon which the admirably written opinion of Judge Taft is based is that a shipper should be compensated for the damages which naturally and proximately result from the breach of contract on the part of the carrier. It is stated further, that the measure of damages as to difference in market values does not apply in cases such as the case at bar *for there has been no loss of market, the goods having been actually transported to their intended*

destination, but that there has been a loss and that loss is the difference between what it would have cost to transport the cargo, if the carrier had lived up to its agreement, and what it actually did cost to transport the cargo when the carrier failed to live up to its agreement. Every statement and rule made and laid down in the opinion in the "Oregon" applies exactly to and fully supports appellee's statement of damages and the measure thereof as found by the District Court. The case cited is exactly in point.

If the appellant had not wrongfully withdrawn the *"Tampico"* from her second voyage, W. R. Grace & Co. would have transported the cargo of nitrates from the West Coast of South America through the Canal to the East Coast of the United States at the stipulated freight rate of $9 per ton. The appellant did, however, wrongfully withdraw the *"Tampico"* and as a result the cargo was misdelivered at San Francisco and transported to its ultimate destination at an additional cost of $4.70 per ton, which was properly charged by W. R. Grace & Co. against the appellee, and for which appellee seeks recovery against the appellant. Under the rule laid down in the cases above cited, that was the only thing that W. R. Grace & Co. and the appellee could do under the circumstances, and the additional cost of transporting and delivering the cargo is the only possible measure of damages that can apply.

Viewing the situation then from the aspect of the appellee, if, under the same circumstances, the appellant had not wrongfully withdrawn the *"Tampico"* from her second voyage, appellee would have received $9 per ton for transporting the cargo from the West Coast of South America through the Canal to the East Coast of the United States, and would not have been forced to expend the various items of the account due to the 100 hours excess time coming to San Francisco, nor would it have lost its 2½% commission on the charter hire provided for in the charter party, nor would it have been forced to pay or allow to W. R. Grace & Co. the additional cost of $4.70 per ton for transporting the cargo from San Francisco to its ultimate destination. The damage, therefore, which naturally and proximately accrued to appellee by reason of appellant's breach of contract, is composed of the various items appearing in appellee's statement of loss and damage.

In further substantiation of the propriety of the acts of appellee and W. R. Grace & Co., and the measure of damages contended for, it appears from the letter of the master of the *"Tampico"* to appellee (First Apostles, pages 121-123) that a substantial portion of the cargo had been loaded on the *"Tampico"* prior to the time that the master was finally directed to proceed to San Francisco instead of to New York. Was it then the duty of the shipper to discharge this portion of the cargo and seek to find other means of transportation to New

York? Was it then the duty of the shipper to discharge this portion of the cargo and abandon it at the loading port and thus seek to establish as a measure of damages the difference in market values at the loading port and the port of destination, less the freight? It was most certainly not the duty of the shipper to pursue either of these courses of action and thus aggravate rather than minimize the damages occasioned by appellant.

The rule laid down in the *"Oregon"* has been universally followed in cases of this kind. Following the rule laid down in the case cited, it is apparent that the difference between the actual pecuniary condition of the shipper, due to the act of appellant in unlawfully withdrawing the *"Tampico"* from her second voyage, and that in which the shipper would have been had the carrier transported the goods under the contract, *is not the profit which the shipper would have made had the contract been performed, for the contract has been performed and he has acquired the opportunity to sell his merchandise at the market prevailing at the place of destination, but it is the increased expense of performing the contract—that is, the difference between the contract rate of freight and the freight which he was actually obliged to pay to secure performance, to-wit, $4.70 per ton.* It is, therefore, in the language of the opinion in the *"Oregon"* not necessary

> "in order to justify the shipper in seeking other means of transportation, and charging the carrier with the increased freight, for him to show either that the profit from the executed

> contract would have equalled or exceeded the increase in the freight. When the shipper contracts with a carrier to transport merchandise, he is legally entitled to have his merchandise carried without regard to the question of whether the transaction would have been profitable to him or not. * * * In such a case the goods, it may be, are brought at the same time into the same market and sold for the same market price as if carried under the contract, but it costs more to get them there. Under these circumstances, neither reason nor authority leaves any doubt that * * * the measure of damages is the difference between the contract and the actual price of freight."

The rule laid down in the *"Oregon"*, which has been followed without exception, is conclusive authority against the measure of damages contended for by appellant in its brief and is equally conclusive authority that the measure of damages contended for by appellee and allowed by the District Court is the only measure of damages that can possibly apply to the case at bar, and pursuant to which the appellee has suffered loss and damage in the sum assessed by the District Court.

Conclusion.

As we have heretofore pointed out, this Court has held that there has been a breach of contract on the part of appellant for which it is responsible to appellee in damages. In so holding it has held that the representations made by appellant were a

part of its contract with appellee. It has held that appellee, in entering into its contract with W. R. Grace & Co., had a right to, and did, rely upon the representations of appellant. It has held that there was a contract between W. R. Grace & Co. and the appellee. It has not questioned the damages sought to be recovered by appellee, nor the propriety of the measure thereof. These matters are res adjudicata and as such will not be again considered.

> "It is not the habit of this Court to consider points again open for discussion which have been once deliberately decided, and which have furnished the ground work for the judgment already rendered in the same cause in a former stage of its proceedings." *U. S. v. 422 Cases of Wine,* 1 Pet. 547; 7 L. Ed. 257.

Appellant has, however, endeavored on this appeal to again raise and reopen these questions and issues that have already been finally and definitely determined and settled, and, under the guise of an appeal from the decree of the Court below on the second trial, to make a last endeavor to avoid and defeat the former judgment and decree of this Court. In remanding this case to the District Court, this Court made inquiry only as to one fact and remanded the case for the sole purpose of ascertaining that fact. In so doing it held, and held properly, that unless the contract of affreightment between W. R. Grace & Co. and appellee was entered into prior to January 11, 1916, the date when appellant first sought to prematurely terminate the agreed-upon second voyage, that appellee could not

recover damages based upon that contract of affreightment. All other issues of the case were finally and definitely decided.

Pursuant to the directions of this Court, the District Court found that the contract of affreightment between appellee and W. R. Grace & Co. for the second voyage of the *"Tampico"* from the West Coast of South America, through the Canal to the East Coast of the United States was entered into *on January 4, 1916.* This finding was based upon the testimony of Mr. Cahill, which, in effect, recites the following facts:

1. That on or about December 27, 1915, appellee received a communication from appellant advising it that the redelivery date of the *"Tampico"* was June 15, 1916 (Second Apostles, page 13).

2. That forthwith, and on or about December 31, 1915, appellee exercised its option for the second voyage of the *"Tampico"* (Second Apostles, page 14).

3. That on or about January 3, 1916, appellant acknowledged receipt of appellee's notice of exercise of said option and inquired as to the voyage (First Apostles, pages 14-15).

4. That immediately thereafter, on January 4, 1916, appellee, through its New York agents, entered into a contract of affreightment with W. R. Grace & Co. for the second voyage of the *"Tampico",* to carry a cargo of nitrates from the West Coast of South America, through the Canal, to the

East Coast of the United States, at the freight rate of $9 per ton, but that if the Canal was closed, at the time the vessel was ready to leave the nitrate port, to San Francisco at the freight rate of $8 per ton (Second Apostles, page 16).

5. That to the letter effecting that agreement was attached, for reference, a copy of the agreement between the same parties on the *"Eureka"* (Second Apostles, page 70). (It is the admitted fact that the Canal was open at the time the *"Tampico"* was ready to leave the nitrate port.)

6. That pursuant to this contract the *"Tampico"* was dispatched on her second voyage to carry a cargo of nitrates for W. R. Grace & Co. from the West Coast of South America, through the Canal, to the East Coast of the United States (Second Apostles, pages 17-18).

7. That for the first time, on January 11, 1916, appellee was notified by appellant that the time and place of redelivery of the *"Tampico"* would be the Pacific Coast on May 15, 1916, instead of the Atlantic Coast on June 15, 1916.

Pursuant to the above facts, the appellant was awarded its unpaid charter hire, and the appellee was awarded its damages, according to its statement of account, in the sum of $14,871.57, plus $2477.27 deduction for time off-hire under the terms of the charter party (which item is not contested by appellant), leaving a net decree in favor of appellee in the sum of $8799.96 with interest at 7% per annum from May 19, 1916, the date when appel-

lant wrongfully retook possession of the *"Tampico"*.

All other questions having been finally and definitely determined by this Court, and being res adjudicata in this case, the District Court on the second trial made its findings, as aforesaid, and although these findings on these particular facts are the only ones that can be attacked on this appeal, the appellant has entirely failed to offer one word of argument or to cite one authority toward a reversal of these findings.

It is respectfully submitted, therefore, that the decree of the District Court should be affirmed.

Dated, San Francisco,
October 23, 1922.

IRA S. LILLICK,
Proctor for Appellee.

THEODORE M. LEVY,
Of Counsel.